82-518

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ALEXANDER L. STEVAS,
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No. -

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ORA ACKERMAN, as Superintendent;
FORT WAYNE STATE HOSPITAL AND TRAINING CENTER, an Instrumentality of the State of Indiana
Petitioners,

v.

HAROLD DELESSTINE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court's standard for establishing wrongful discharge under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973) and 42 U.S.C. §2000 *et seq.* is met and the burden properly shifted to defendant employer when the discharged minority member is replaced by another minority member.

2. Whether the *McDonnell Douglas* test can be utilized to establish illegal racial animus when the public entity employer has enunciated a clear non-discriminatory reason for the discharge and provided unrefuted evidence of the statistical make-up of the work force which totally rebutes a finding of racial animus.[1]

LIST OF PARTIES

The caption of this case contains all the parties within the meaning of Rule 21.1(b) of the Rules of this Court.

[1]Respondent did not attempt to show either disparate impact or disparate treatment which would preclude Petitioners' neutral statistics under *Connecticut v. Teal*, ___ U.S. ___, 102 S.Ct. 2525 (1982). Petitioners contend that *Teal* does not prevent an employer's use of statistics combined with a nondiscriminatory reason as a valid defense in a Title VII action.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit, hereafter Seventh Circuit, was issued June 24, 1982. It is reported at 682 F.2d 130 and a copy is attached to this Petition at A-1. The unreported district Court decision is attached at A-16.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1) and Rule 17.1(b) and (c) of the Rules of this Court to review a decision of the Seventh Circuit which is in conflict with applicable decisions of this Court regarding material elements of the *McDonnell Douglas* test; the weight to be attached to the statistical make-up of the employer's workforce; and a decision of the Fifth Circuit regarding possible mistaken belief of the employer as a defense.

This Petition is timely filed within the ninety (90) day period established by 28 U.S.C. §2101(c) and Rule 20.4 of the Rules of this Court.

STATUTORY PROVISIONS INVOLVED

This case arose as a standard civil rights action under 42 U.S.C. §2000e *et seq.*, A-27. It, and the interpretive decisions of it by this Court, are the only provisions involved in this Petition.

STATEMENT OF THE CASE

This action commenced with the filing of Respondent's Complaint on July 25, 1978. After appropriate pretrial matters were disposed of, the case went to bench trial on June 7 and July 7, 1980. This review commenced with entry of judgment by the District Court on July 23, 1980 awarding Respondent back pay. A divided Seventh Circuit affirmed the District Court on June 24, 1982.

FACTS MATERIAL TO CONSIDERATION OF THE QUESTIONS PRESENTED

A number of facts established in this action are essentially undisputed. Respondent DeLesstine, a black male, was employed at Fort Wayne State Hospital as a dietician, a position with supervisory authority. Petitioner, Dr. Ora Ackerman, was and is the Superintendent of that institution. Respondent was on leave with pay for a portion of 1974 due to hemorrhoid surgery. Leave began April 16, 1974. Prior to July 16, 1974, Respondent received a number of statements from his attending physician extending his return to work date. All of these were presented to the employer and none indicated any limited release to work anywhere.

During the extended leave, Respondent worked May 28, May 31, June 26, June 27 and July 11, 1974, at Glen Oaks Nursing Home in Auburn, Indiana, all days and hours he would have worked at Fort Wayne State Hospital. There was no written communication from either Respondent or Respondent's physician to Fort Wayne State Hospital indicating this outside employment was permitted. Respondent acknowledged in testimony that no one at Fort Wayne knew that he had even commenced such outside employment. Respondent also admitted he knew of no individual during his eleven (11) year tenure with Fort Wayne State Hospital who accepted sick pay benefits from the institution while working elsewhere and was not disciplined.

Petitioner Ackerman, Superintendent of Fort Wayne State Hospital, discovered Respondent's outside employment by report from an employee, and, after reviewing the continued excuses referred to above, discharged Respondent. Respondent was suspended July 16, 1974, pending dismissal thirty (30) days later.

Petitioner Ackerman, Superintendent of Fort Wayne Hospital since June 1, 1966, has disciplined a number of

employees, both black and white, who have drawn sick pay from the state institution while working elsewhere. Five (5) or six (6) individuals were dismissed for such a practice in the past, both white and black.

Undisputed testimony established that there are currently about 1,200 persons employed at Fort Wayne State Hospital and, in 1974, that number was between 1,300 and 1,400. There are approximately two (2) black individuals in supervisory roles to every (1) white in a similar position at the institution.

Dr. Edward Sirlin, medical director at Fort Wayne State Hospital during 1974, telephoned Respondent's physician on or about July 11, 1974 concerning Respondent. No mention of any limited release to work was made by Respondent's physician. After Respondent's suspension pending dismissal on July 16, 1974, Dr. Sirlin again called Respondent's physician. Dr. Sirlin recalls a negative response from Respondent's physician concerning permission to work, a position which Dr. Sirlin indicated to Petitioner Ackerman by written report. Respondent's physician recalled one (1) phone conversation, apparently the conversation prior to July 16, 1974, but was uncertain of any others.

Respondent's position at the institution was temporarily filled by a white male. His position was permanently filled by a Ms. Effie Goodwin Lee, a white female, after a national search by the institution.

Respondent produced no evidence to rebut the statistical racial analysis of the work force, establish disparity of treatment, or show nonexistence of the policy of discharging employees who work for other employers while accepting sick pay benefits from the institution.

REASONS FOR ALLOWANCE OF THE WRIT

I.

The Opinion of the Seventh Circuit Either Ignores the Standard *McDonnell Douglas* Test or Engrafts Upon it a Requirement Not Called for by Decisions of this Court

This Court in *McDonnell Douglas v. Green*, 411 U.S. 792, (1973) adopted a four part test to assist plaintiffs in establishing a *prima facia* case in a Title VII action.[2] Once the *prima facia* case is established the burden shifts to the employer to articulate some legitimate, non-discriminatory reason for the action, *McDonnell Douglas*, *supra* at 803-804.

It is Petitioners' contention that element (IV) of the test in a discharge setting requires that the plaintiff establish that after his discharge his position was filled by a member of a non-protected minority. The result is clearly the only means of preserving the logic and intent of the original *McDonnell Douglas* test.

It is undisputed that Respondent was replaced by a white female of similar qualifications. Clearly females are afforded protected status by federal law, 42 U.S.C. §2000e *et seq.*. Respondent, therefore, did not establish a *prima facia* case within the meaning of *McDonnell Douglas*.

Judge Cummings, writing for majority in the Seventh Circuit, concluded that the applicable language in element (IV) of the *McDonnell Douglas* test referred solely to the similarity between the replacement's and Respondent's

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[2] "This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." *McDonnell Douglas*, *supra* at 802.

qualifications and not the replacement's status as a protected minority, 682 F.2d at 133.[3]

Petitioners submit that the Seventh Circuit has corrupted the *McDonnell Douglas* standard by either ignoring the clear import of this Court's original decision or by engrafting upon it a provision uncalled for by this Court. The entire theory of the *McDonnell Douglas* standard is to assist potential plaintiffs in establishing their case in an area often difficult to prove. Ignoring Petitioners' employment of a protected minority does *not* demonstrate the animus that the *McDonnell Douglas* test permits a court to infer. Indeed, affirmatively hiring protected minorities strongly indicates that an employer's action toward a single employee was motivated by something *other* than the proscribed animus.

II.

Petitioners Properly Articulated a Non-Discriminatory Reason for Respondent's Discharge and Presented a Defense Based Upon a Numerical Analysis of the Workforce Which Was Ignored by the Seventh Circuit

Respondent was dismissed for conduct unbecoming a state employee; specifically, Respondent was working elsewhere while accepting sick pay benefits from the State. Petitioner Ackerman had disciplined other employees, both black and white, during his tenure as Superintendent for the same reason.

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[3]This result was made apparent by the Court in a footnote.

"... As will be clear from our analysis, we disagree with the language of the *Markey* [*v. Tenneco Oil Co.*, 439 F.Supp. 219, 223 (D.C. La. 1977), *aff'd* in part and *rev'd* in part, 635 F.2d 497 (5th Cir. 1981)] court that appears to require for proof of a prima facia case of a Title VII discrimination that the person discharged be replaced by a "non-minority." 682 F.2d at 132 n. 1.

The Seventh Circuit concluded that the reason given was pretext masking racial animus.[4] Presumably, this result was reached on the basis of a conflict between the testimony of Respondent's physician and Petitioner's employee, Dr. Sirlin, regarding the number and content of telephone conversations occurring *after* the suspension pending termination was entered.

Undisputed evidence established that at the time Petitioner Ackerman decided to discharge Respondent, he, Petitioner Ackerman, had before him only a series of notes from Respondent's physician extending Respondent's return to work date and containing no limited release to work or approval to work, and direct confirmation that Respondent was working elsewhere. On this evidence and over the adamant dissent of Judge Pell, the Seventh Circuit concluded that the Petitioner's articulated reason was pure pretext masking racial animus.

Assuming, arguendo, that Petitioner Ackerman was mistaken regarding the release to work, Petitioners submit that mistake as to facts, if honestly held, does not show illegal intent or establish that the reason was pretext under the rule adopted in the Fifth Circuit, *Turner v. Texas Instruments*, 555 F.2d at 1256-1257 (5th Cir. 1977).

Or assuming, arguendo, that Petitioner Ackerman disliked or bore ill will toward Respondent, it is clearly impossible to conclude that the ill will was based upon racial animus made illegal under Title VII when the undisputed evidence makes apparent that of the some 1,200 employees under Petitioner Ackerman's charge there are twice as many black supervisory staff as white.

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[4] "In summary, the appellant's articulated reason of 'conduct unbecoming a state employee' was a conclusory reason which might have been a legitimate reason for discharging the appellee if he had not been able to prove employer's intentional discrimination by showing that the articulated reason was mere pretext." *682 F.2d 136.*

Racial animus, by its very nature, would logically be exhibited by the employer toward all employees of that race. Where, as here, evidence shows a highly favorable workforce composition, that evidence would strongly indicate lack of racial motivation in the individual case. The entire purpose of the *McDonnell Douglas* test and the disparate impact theory of *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) is to *infer* racial animus where it likely exists;[5] not to impose liability where none is present.

By corrupting the *McDonnell Douglas* test and finding the stated reason as pretext, the Seventh Circuit has concluded that a superintendent of fourteen (14) years experience at the state institution harbored *racial* animus, not toward all black supervisors, but toward Respondent solely, and secreted away that racial animus some eight (8) years before he gave vent to bigotry and discharged Respondent. This result is clearly absurd.

As Judge Pell properly noted:

> I fail to follow the logic of the majority opinion in its holding that the discharge was pretextual. The record is silent as to any discriminatory practices on the part of the appellants toward any employees because of race, color, religion, sex, or national origin. The finding of pretext dangles on the weak thread of the

[5] "A prima facie case under *McDonnell Douglas* raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are most likely than not based on the consideration of impermissible factors. (citations omitted) And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, whom we generally assume acts only with some reason, based his decision on an impermissible consideration such as race." *Furnco Const. Corp. v. Waters*, 439 U.S. 562, (1978).

plaintiff's not being well enough to return to his state job and contradictory testimony as to what one doctor said to another. Apparently, the majority makes the credibility determination as to the accurate reflection of this conversation. Elsewhere, however, in the majority opinion it is clear that the memorandum from Dr. Sirlin to Dr. Ackerman was subsequent to the determination already made, and properly so, that the discharge was justified by conduct unbecoming to a state employee. I see nothing conclusory or pretextual about guarding the public coffers from unwarranted criticism.

In short, the majority's syllogism seems to be that plaintiff was a member of a protected minority class, that he was a competent employee with acceptable qualifications, that he was discharged because he was working on another job while on sick leave, *ergo*, the reason given for his discharge was pretextual. The process ignores the fact that there was a legitimate non-discriminatory reason for the discharge. What Title VII is all about is to put a stop to discriminatory treatment of employees. The essential element of discrimination is missing here. 682 F.2d at 137-138.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the decision of the Seventh Circuit.

Respectfully submitted,

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